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JALIYAH MUHAMMAD, on her own behalf and all others similarly situated, Plaintiff/Appellant,	:	SUPREME COURT OF NEW JERSEY
	:	Docket No. 58,430
v.	:	
COUNTY BANK OF REHOBOTH BEACH, DELAWARE, EASY CASH TELECASH AND MAIN STREET SERVICE CORPORATION, JOHN DOE AND JOHN ROE, Defendants/ Respondents	:	NOTICE OF MOTION FOR RECONSIDERATION OF COURT DECISION OF AUGUST 9, 2006

To: All counsel listed below:

PLEASE TAKE NOTICE that as soon as counsel may be heard, the undersigned attorneys for Defendants/Respondents, County Bank of Rehoboth Beach, Delaware and Main Street Service Corporation, shall move before the Supreme Court of New Jersey, Hughes Justice Complex, 25 West Market Street, Trenton, New Jersey 08625, for an order granting their Motion for Reconsideration of the Court's decision dated August 9, 2006. A copy of the Court's August 9, 2006 decision is attached to this Notice of Motion. In support of this Motion, Defendants/Respondents will rely upon the attached Memorandum of Law, containing the basis and ground of said Motion.

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JALIYAH MUHAMMAD, on her own behalf and all others similarly situated, Plaintiff/Appellant,	:	SUPREME COURT OF NEW JERSEY
	:	Docket No. 58,430
v.	:	
COUNTY BANK OF REHOBOTH BEACH, DELAWARE, EASY CASH TELECASH AND MAIN STREET SERVICE CORPORATION, JOHN DOE AND JOHN ROE, Defendants/ Respondents	:	PROOF OF SERVICE

I hereby certify that two true and correct copies of Defendants/Respondents' Motion for Reconsideration and this Certification of Service are being duly served upon each of the counsel for the Plaintiff/Appellant and amici applicants, by first class mail, on August 21, 2006, addressed as follows:

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I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willingly false, I am subject to punishment.

/s/
Marc J. Zucker, Esquire

Dated: August 21, 2006

JALIYAH MUHAMMAD, on her own behalf and all others similarly situated, Plaintiff/Appellant,	: SUPREME COURT OF NEW JERSEY
	: Docket No.: 58,430
v.	:
COUNTY BANK OF REHOBOTH BEACH, DELAWARE, EASY CASH TELECASH AND MAIN STREET SERVICE CORPORATION, JOHN DOE AND JOHN ROE, Defendants/ Respondents	: ON INTERLOCUTORY REVIEW OF JULY 14, 2005 DECISION OF APPELLATE DIVISION STAYING ACTION AND COMPELLING ARBITRATION

SAT BELOW:
HON. HOWARD H. KESTIN, PJAD
HON. STEVEN L. LEFELT, JAD
HON. JOSEPH A. FALCONE, JAD
SUPERIOR CT OF NJ, APP. DIV.
Docet No. A-0558-04T3

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'/RESPONDENTS' MOTION FOR RECONSIDERATION

On the brief:

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Date: August 21, 2006

PRELIMINARY STATEMENT

As this Court noted, its August 9, 2006 holding that NewJersey law on unconscionability prohibits class arbitration waivers in "low value" consumer arbitration agreements represented its first articulation of this legal principle. The decision likewise is novel in elevating the procedural device of class arbitration, never previously addressed by the Court, into a substantive right under certain circumstances.

The effects of the Court's ruling are both global and casespecific. On a global level, the Court's ruling disregards the preemptive effect of the Federal Arbitration Act, 9 U.S.C. §§116 ("the FAA"), because it interprets New Jersey law in a way that discriminates against arbitration agreements in certain consumer contracts. The Court's ruling invites arbitrary interpretation among the lower courts of this state, as well as forum shopping between state and federal courts in New Jersey, because it gives no guidance regarding its newly-created distinction between "high" and "low" value consumer claims. The Court is unable to cure this problem through line drawing because any attempt to do so would itself be arbitrary. By severing the class arbitration waiver from the arbitration agreement, the Court has redrafted the parties' agreement in a way that conflicts with the letter and spirit of the FAA, again subjecting New Jersey law to federal preemption, and more immediately, creating uncertainty for New Jersey's lower courts, consumers and businesses.

In addition the Court's ruling presents problems specific to the instant case:

- The ruling presents federal and equitable due process and dormant commerce clause concerns because it applies a new interpretation of New Jersey law retroactively to the arbitration agreements at issue here,

unduly burdens commerce and effects a wholesale modification to the nature of the parties' bargain.

- The ruling is based on findings of "facts" not contained in the record on appeal.
- The Court should have considered defendants' arguments regarding the Delaware choice of law clause contained in the contracts at issue. Defendants invite the Court to give full consideration to its choice of law arguments, and/or remand for the trial court to do so.

For all of these reasons, defendants respectfully request that the Court reconsider its August 9, 2006 ruling in this matter.

ARGUMENT

I. FEDERAL LAW PREEMPTS THIS COURT'S HOLDING THAT CLASS WAIVERS ARE UNCONSCIONABLE.

State law is preempted whenever it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fid. Fed. Sav. & Loan Assn v. de la* ***Cuesta,*** 458 U.S. 141, 153 (1982) (internal quotation marks omitted). In declaring class arbitration waivers unenforceable in "low" value **cases,** this Court has placed its own policy preference for class actions squarely above Congress's policy of ensuring the enforcement of arbitration **agreements** as written. ***See, e.g.,*** *Mastruobuono v. Shearson Lehman* Hutton, *Inc.*, 514 U.S. 52, 53-54 (1995) ; *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.,* 489 U.S. 468, 475 (1989). When state and

Congressional policies clash, Congress prevails. *Perry v. Thomas,* 482 U.S. 482, 491 (1987).[1]

The FAA preempts state laws which arbitrarily hinder arbitration, including state law which prohibits class action waivers. *See Schultz v. AT&T Wireless Services, Inc.,* 376 F. Supp. 2d 685 (N.D.W.V. 2005). In *Shultz,* a West Virginia district court concluded that, if West Virginia law were read to preclude class action waivers, it would run afoul of the FAA and be preempted. The court cited a number of federal cases holding that the FAA preempts "state rules of contract formation which single out arbitration clauses and unreasonably burden the ability to form arbitration agreements." *Id.* at 689, 690 (quoting *Saturn Distrib. Corp. v. Williams,* 905 F.2d 719, 723 (4th Cir. 1990)). *Shultz* rejected an argument that West Virginia law enshrined a right to class actions that could not be vitiated by an arbitration clause, and concluded that "the plaintiffs argument that the arbitration clause is unconscionable due to its foreclosure of class action relief also lacks merit." *Id.* at 691.

The conflict contemplated in *Schultz* is the precise problem presented in Muhammad. Aside from conflicts with

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[1] The United States Supreme Court has long recognized that, "[i]f the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought." *Bernhardt v. Polygraphic* Co., 350 U.S. 198, 203 (1956). The converse, of course, is equally true: . Parties to a contract evidencing interstate commerce should not be permitted to avoid arbitration by filing their action in a state court when,, had the action been brought in federal court, they would have been compelled to arbitrate. *See Burke Co. Public Sch. Board of Education v. Shaver Partnership,* 303 N.C. 408 (1981). To prevent such conflicts, Congress specifically imbued the FAA with preemptive force-where state and federal law would result in disparate rulings, the state burdening arbitration while federal law promotes it, the federal law must govern.

other appellate courts, the decision at bench conflicts with *Johnson v. West Suburban* Bank, 225 F.3d 366, 374 (3d Cir. 2000), thereby creating confused and conflicting law for New Jersey litigants.

Until now, the jurisprudence of this state did not conflict with the FAA. Having now articulated a new interpretation of the law, the Court's ruling will be preempted because, as demonstrated in the succeeding sections, it directly conflicts with the FAA, in letter and in spirit.

II. A RULE AGAINST CLASS ARBITRATION WAIVERS FOR "LOW VALUE CONSUMER CLAIMS" NECESSARILY DISCRIMINATES AGAINST ARBITRATION AND FRUSTRATES THE PURPOSES OF THE FAA.

The enforceability of an arbitration agreement does not and cannot depend on the value of the claims sought to. be arbitrated. To subject arbitration agreements to such an *ad hoc* standard for enforceability, which is not generally applicable to other types of contracts, violates the FAA. *See Martindale v. Sandvik, Inc.*, 173 N.J. 76, 86 (N.J. 2002) *(quoting Perry v. Thomas,* 482 U.S. at 492 n.9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." However, states may not "decide that a contract is fair enough to enforce all its basic terms but not fair enough to enforce its arbitration clause" because "that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") See also, *Schultz v. AT&T Wireless Services, Inc.*, 37 F. Supp. 2d 685, 690-91 (2005) ; *Park v. Merrill Lynch,* 159 N.C. App. 120, 122, 582 S.E.2d 375, 378 (2003).

Though true that the FAA permits states to regulatearbitration agreements, including enforcing or rejecting such agreements on "grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, the unconscionability rule applied in this case is not a ground that exists for *any* contract, but rather *only* for the narrow class of terms or agreements relating to the procedures available to claimants in arbitration, and *only* to certain entities whose business may generate small dollar consumer claims. In short, New Jersey's general rule on unconscionability does not prohibit arbitration agreements, or even arbitration agreements containing class waivers. There was no federal conflict until this Court created the new subcategory of cases that this Court has ambiguously named "low value consumer claims."

Indeed, this arbitrary line between "low value" and "high value" loans would also prove unworkable in practice, because it necessarily would invite courts to draw *post hoc,* arbitrary lines between claims that are substantial "enough" to merit individual arbitration and claims that are thought to be too small to justify it, and without knowing the size of claims to be asserted by other members of the putative class. *Compare, Muhammad* with *Delta Funding Corp. v. Harris,* 2006 WL 2277984 (N.J. 2006); *see Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 282 (1995) (O'Connor, J., concurring) (emphasizing that courts should avoid interpreting FAA in a way that would "foster pre-arbitration litigation that would frustrate the very purpose of the statute"). If such a bright line should be drawn, Congress is in the best position to draw it.

The Court's opinion articulates a preference for class actions over the policy preference of Congress in enacting the FAA: to ensure enforcement of arbitration provisions as written. *See, e.g., Mastrobuono v. Shearson Lehman* Hutton, *Inc.,* 514 U.S. 52, 53-54 (1995); *Volt Info., supra,* 489 U.S.

at 479; *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 219-221 (1985). As noted above, when state and Congressional policies clash on, application of the FAA, the latter must prevail. *Perry v. Thomas,* supra, 482 U.S. at 491.

III. SEVERING THE CLASS ARBITRATION WAIVER RESULTS IN THE EFFECTIVE DENIAL OF DEFENDANTS' MOTION TO COMPEL ARBITRATION AND VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

Respectfully, this Court's decision to sever. the class waiver effectively denies defendants' motion to compel arbitration while purporting to compel it. Moreover, severing the arbitration agreement is hostile to the FAA, contrary to the agreement of the parties, and is a violation of defendants' due process rights under the 14th Amendment of the U.S. Constitution.

Section 2 of the FAA declares pre-dispute arbitrationagreements "valid, irrevocable, and enforceable" because "arbitration saves time, saves trouble, saves money." Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong., 1St Sess. 7 (1924) (statement of Charles Bernheimer, N.Y. Chamber of Commerce). As Congress later explained, arbitration usually is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility," and is "more flexible in regard to scheduling." H.R. Rep. No. 97-542 a 13 (1982). A limitation in an arbitration agreement precluding class actions or arbitrations is essential to preserve the "simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985).

The Court's decision to eliminate class arbitration waivers effectively denies defendants the benefit of their bargain, and threatens to subject them to a massive procedural morass and chilling threat of limitless damages. Whether conducted by a court or by an arbitrator, all of the procedures necessary to the fair administration of a class action will make arbitration much more expensive and time consuming. In fact, many commentators believe that "class arbitration may actually prove more burdensome than class litigation" because the simplified procedures in arbitration were never designed with class actions in mind. Jack Wilson, "No-Class-Action Arbitration Clauses," State-Law Unconscionability and the Federal Arbitration Act: A Case For Federal Judicial Restraint and Congressional Action, 23 Quinnipiac L. Rev. 737, 774 (2004). Subjecting the parties to class arbitration has the same (or worse) effect as denying defendants' motion to compel arbitration and ordering the case to proceed in court as a class action, and the Court's ruling is not saved by blue penciling the parties' agreement.

Indeed, the severance is more than the mere removal of a few words which the Court believed to be unconscionable. It effects a wholesale re-writing of the parties' agreement, qualitatively (and, as discussed in greater detail below, retroactively) changing a contract among three parties - a borrower (Muhammad), lender (County Bank) and servicer (Main Street) - into one with potentially thousands of other parties.

Moreover, the Court's holding is directly in conflict with the U.S. Supreme Court's holding in *Green Tree Financial v. Bazzle,* 539 U.S. 444, 451-52 (2003). In *Bazzle,* the Court held that the question of whether the parties' dispute was subject to class arbitration did not fall into the narrow exception of arbitration-related matters intended to be decided by a court instead of an arbitrator. Rather, such an issue was itself arbitrable, and therefore was for the

arbitrator, not the courts, to decide. *Id.* Where, as here, the arbitration agreement clearly reflected an intent against class arbitration, the result should be no different. An arbitrator, not a court, should decide whether the parties, expressed intent must be disregarded.

IV. THE COURT'S RULING ARTICULATES A NEW INTERPRETATION OF NEW JERSEY LAW AND SHOULD NOT BE APPLIED RETROACTIVELY.

In its Opinion, this Court expressly noted that the issue of class arbitration "specifically has never before been examined by this Court." Opinion at 17-18. The Court also acknowledged that the legislature did not provide guidance on the issue of class arbitration, noting that " [c] lass arbitration is in its infancy and may provide a fertile ground for establishing flexible class-action procedures" and advising that "the United States Congress and/or [the] State Legislature may amend class-action procedures should they perceive deficiencies in the current process." Opinion, at 28. Indeed, the ruling is doubly novel in elevating the class action, for the first time, from a procedural device to a substantive right. Because the Court has articulated a new legal principle, it would violate defendants, due process rights to apply that decision retroactively to these parties.

New Jersey law prior to Muhammad held that a waiver of certain rights in an arbitration clause would be enforced so long as they were sufficiently notorious and specific. *Gras v. Associates First Capital Co.,* 346 N.J. Super. 42, 49-57 (App. Div. 2001), *cert. denied,* 171 N.J. 445 (2002). In *Muhammad,* the Court distinguished between "low value" and "high value" plaintiffs' claims in determining that a class arbitration waiver is unconscionable and unenforceable when it involves an undefined small amount of money, while a separate ruling on the same day in

Delta Funding, supra, held that such waivers *were* enforceable and not unconscionable when they involved a larger monetary claim. The Court has retroactively applied its holding to invalidate literally thousands of similar agreements containing express waivers of a consumer's ability to bring a class action in arbitration.

While the Court may determine that its ruling must stand, it should not be applied retroactively to the parties here because to do so would. cause manifest injustice. Retroactivity is generally disfavored in the law. *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 208 (1988), see H. Broom, Legal Maxims 24 (8th ed. 1911) ("Retrospective laws are, as a rule, questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law").. Both federal and New Jersey law establish that there are explicit and implied limitations on the legislature's power to impose laws retroactively. Article I, Section 10 of the U.S. Constitution provides that "[n]o State shall…pass any...law impairing the obligation of contracts." Just as legislatures are barred, so are the courts.

All statutes with retroactive elements are subject to scrutiny under the due process clause of the Fourteenth Amendment of the U.S. Constitution and the parallel provision of the New Jersey Constitution. U. S. Const. amend. XIV, § 1; N.J.Const., art. 1, ¶ 1. In fact, a court may not automatically apply a change in the law retroactively where the application of that law attaches new legal consequences to completed, past conduct that was legal at the time. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15-16 (1976). In adopting the *Usery* standard, this Court determined that "[a] consistent line of decisions by the United States Supreme Court interpreting the Due Process

Clause of the Fourteenth Amendment holds that retroactive legislation does not deprive parties of due process if the legislation "is supported by a legitimate legislative purpose furthered by rational means." Nobrega v. *Edison Glen Assoc.,* 167 N.J. 520, 543 (N.J. 2001), *citing Pension Ben. Guar. Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 729 (1984).

As this Court held in *Montells v. Haynes,133* N.J. 282, 295, 627 A.2d 654,660 - 661 (1993):

> Prospective application is appropriate when a decision establishes a new principle of law by overruling past precedent or by deciding an issue of first impression. *Coons v. American Honda Motor Co.,* 96 N.J. 419, 427, 476 A.2d 763 (1984), cert. denied, 469 U.S. 1123, 105 S.Ct. 808, 83 L.Ed.2d 800 (1985) (Coons II). Together with those considerations, we must also weigh whether retroactivity furthers the underlying purpose of the rule and whether retroactive applications could produce substantial inequitable results. *Coons II, supra,* 96 N.J. at 427, 476 A.2d 763. As *Coons II* states, our case law roughly parallels that of the United States Supreme Court on the issue of prospectivity. 96 N.J. at 428, 476 A.2d 763. In reversing a decision that followed the general rule of retrospective effect, *Coons II* applied "principles drawn from our own state court decisions as well as from United States Supreme Court cases." Id. at 425, 476 A.2d 763. Coons II recognized that *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), best typified federal prospectivity analysis. Just last month, however, the United States Supreme Court cast doubt on the continuing vitality of Chevron's prospectivity analysis in cases of federal law. *Harper V. Virginia Department* of Taxation, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).

> Whatever path that Court may follow, we believe that in an appropriate case a purely prospective application may provide the fairest and most equitable disposition.

133 N.J. at 295, 627 A.2d at 660 - 661.

In this case, there is no legitimate purpose for retroactive application of the new rule articulated by the Court. Indeed, the Court's holding is directly contrary to the legitimate state and federal policy favoring the resolution of disputes through arbitration. In addition, the Court's distinction between the claims in *Delta Funding* and those in *Muhammad* does not meet the "rational means" prong of the *Usery* test because the Court has chosen to draw arbitrary lines based on the undefined value of claims - including unknown claims of putative class members - rather than articulating a rule that can be uniformly applied.

In addition to the constitutional due process inquiry, this Court has determined that a statute (or case law interpreting a statute) may not be applied retroactively if to do so would cause a manifest injustice. *Nobrega, supra,* 167 N.J. at 545. "The concern that is implicated by the standard of `manifest injustice' in assessing the retroactive application of a statute need not reach constitutional levels. Hence, while our inquiry into whether there has been a `manifest injustice' is informed by our consideration of issues of constitutional due process, it is not necessarily determined by those issues." *In re D. C.,* 146 N. J. at 58. The essence of the manifest injustice inquiry is whether the affected party relied, to his or her prejudice, on the law that is now to be changed as a result of the retroactive application of the law, and whether the consequences of this reliance "are so deleterious and irrevocable that it would be unfair to apply the statute retroactively." *Gibbons v. Gibbons,* 86 N.J. at 523-25.

As set forth above, the Court's ruling in *Muhammad* effectively may be deemed to invalidate thousands of existing contracts in which the parties expressly waived certain rights to court proceedings and class actions, and impacts every lender and merchant that offers credit cards to New Jersey residents, as well as all sellers of retail consumer goods that rely on class action waivers in arbitration agreements. Such a sweeping application of a fact-specific analysis is arbitrary and irrational and cannot be the basis for retroactive application of this ruling. *Usery, supra,* 428 U.S. at 15. Not only does the ruling in *Muhammad* impose additional obligations on defendants that were not negotiated by the parties, but these terms directly contradict the express agreement of the parties. A retrospective application of the ruling in *Muhammad* will result in lengthy and expensive class action arbitration against defendants that was not anticipated by the parties at the time of entering into the contract, and it will have the chilling. effect of discouraging other businesses from doing lending in this so-called "low value" arena, an area in which customers arguably need additional options, not fewer.

These burdens implicate not only the due process clause but also the dormant commerce clause, as applied by the U.S. Supreme Court. *See, BMW of North America, Inc. v. Gore,* 517 U.S. 559, 572 n. 17 (1996); *Ileto v. Glock Inc.,* 349 F.3d 1191, 1217 (9th Cir. 2003)(noting in dicta that a dormant commerce clause claim may be premised on court action in a civil lawsuit).

V. THE NON-RECORD FINDINGS AND ASSUMPTIONS RELIED UPON BY THIS COURT SHOULD BE RECONSIDERED OR TESTED ON REMAND.

In support of its holding that the class arbitration waiver contained in the parties' arbitration agreements is unconscionable under New Jersey contract law, the Court made a series of factual findings and assumptions which either had no foundation in, the trial court record or were contrary to the facts of record. Among those findings were the following:

- The Court found that Muhammad's "small" damage claim "render[s] individual enforcement of her rights, and the rights of her fellow consumers, difficult if not impossible." Id. at 22. It found further that "the availability of attorney's is illusory" because "it is unlikely that counsel would be willing to undertake the representation." *Id.* at 24. Respectfully, these findings are not supported by the trial court record, and to the contrary are contradicted by the trial court's conclusion that Muhammad was able to vindicate her rights in an individual arbitration. (PA761-800).[2]

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[2] Muhammad alleges violation of the New Jersey Consumer Finance Act against the marketers (Count I) and County Bank (Count II) ; usury against the marketers (Count III) ; violation of New Jersey's RICO statute against the marketers (Count IV); and conspiracy to violate RICO against County Bank (Count V). She seeks a return of all monies paid on the usury claims, and a subsequent trebling of that amount against each defendant for the Consumer Finance Act and RICO claims, *plus* pre-judgment interest and attorney fees.

As noted above, no information whatsoever is known about the size of claims of other putative class members.

- The Court found that the instant case involves complicated financial arrangements (Opinion at 26), even though the loan transaction at issue was a small consumer loan, evidenced by a one-sided, single page note, transacted over a fax machine.

- The Court found that the arbitration agreements contain limits on discovery (Opinion, p. 21), even though the arbitration agreements do not mention discovery.

- The Court found that Muhammad and other members of the putative class are under a high degree of economic compulsion, "compelling their acquiescence to loans bearing exorbitant interest rates" (id., fn. 4), even though there is no evidence on the record that either Muhammad or any other consumer who obtained a loan from County Bank was under such compulsion.

Focusing for a moment solely on the Court's "complexity" and "low value" findings, both *Muhammad* and *Delta Funding Corp. v. Harris,* No. A-44-05 (N.J. Aug. 9, 2006), involve transactions by individual consumers with multiple, heavily regulated, out-of-state financial services entities. As a predicate to severing the prohibition on class arbitration in the former but not in the latter, the Court found that the transaction in *Muhammad* was "complicated" and that its complexity was a factor that precluded enforcement of the prohibition on class arbitration. See Muhammad, Slip Op. at 25 ("One may be hard pressed to find an attorney

willing to work on a consumer-fraud complaint involving complex arrangements between financial institutions of other jurisdictions when the recovery is so small."). Ignoring the provisions in the contract and pertinent statutes for damages-multipliers, recovery of costs and attorneys fees, as well as substantial precedent to the contrary, the Court instead summarily concluded that no attorney would be willing to represent a consumer in such a ".complex" case absent-a potential windfall recovery in the form of contingency fees. *Muhammad* Slip Op. at 18 (noting that "attorney's actual fees" insufficient incentive to bring action).

In a recent case squarely on point, the First Circuit explicitly held that a deferred-deposit short-term loan identical in all material respects to that at issue in Muhammad did not present the sort of factual complexity that may necessitate the severance of an arbitration provision barring use of class mechanisms. See *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006). Distinguishing the decisions of four other circuits that enforced consumer arbitration provisions barring class mechanisms (including the Third Circuit), the Court found that an antitrust action was inherently more complex than the transactions at issue in those cases and severed these provisions from the arbitration agreement. The Court distinguished *Snowden v. CheckPoint Check Cashing,* 290 F.3d 631 (4th Cir. 2002), in which the Fourth Circuit had upheld a provision barring class mechanisms in a dispute over a short-term loan transaction that was identical in all material respects to that at issue in *Muhammad.* The Court found that,

> In a case such as *Snowden,* there is a specific transaction at issue... This is not a particularly difficult ,analysis....

Kristian, 446 F.3d at 57-58 (citation omitted). As the First Circuit recognized, where as here, the terms governing the

parties' relationship (including the relationship between County Bank and Main Street Service Corp.) are clearly set forth in a comparatively short written agreement, the applicable law is straightforward and well settled.

The assumptions made by the Court regarding the size of plaintiff's claim and the complexity of her case have no support in the record and therefore should not have been relied upon. *See Cipala v. Lincoln Technical institute,* 179 N.J. 45, 52, 843 A.2d 1069 (2004). To the extent factual findings such as those articulated by the Court are necessary to determine the issue of unconscionability, then the matter should be remanded to the trial court for such additional findings.

VI. ON RECONSIDERATION, OR ON REMAND, A COURT MUST DETERMINE WHETHER DELAWARE LAW APPLIED TO THE UNCONSCIONABILITY ANALYSIS.

In the course of addressing the enforceability of the classarbitration waiver, the Court articulated and applied new principles of New Jersey law, (Opinion, pp. 31, 32), despite the fact that, to the extent state law applies at all, the parties' contract, including .the arbitration agreement, is governed by the state law of Delaware.

The three contracts signed by Muhammad contain a clear and prominent Delaware choice of law provision (Pal86-188). Muhammad accepted the choice of Delaware law in connection with this transaction and made no attempt at the trial court level or on appeal to challenge the Delaware choice-of-law clause in the agreements she signed. To the contrary, Muhammad conceded that, as a Delaware state-chartered bank, County Bank is not subject to New Jersey law. (Pa10, 329), and acknowledged that among the rights

Muhammad waived was "the right to have New Jersey law apply." (Pa330) .

The Appellate Division stated in footnote 3 of its opinion that the choice-of-law issue was not briefed or addressed in the trial court, but rather was asserted by defendants in a footnote in their appellate brief. *Muhammad v. County Bank of* Rehoboth *Beach,* 379 N.J.Super. 222, 234 n.3, 877 A.2d 340, 347 n.3 (App.Div. 2005). In fact, despite Muhammad's concession that as a Delaware state-chartered bank, County Bank is not subject to New Jersey law, and her failure to challenge the Delaware choice of law clause in the agreements she signed, defendants nevertheless *raised the issue repeatedly* before the trial court and on appeal. *(See* Pa36, 43, 611 n. 3, 627; *see also,* February 11, 2005 appellate division reply brief in response to amici at pp. 9-11, devoting an entire section to this argument).

While maintaining the mistaken view that the application of Delaware law had been raised solely in a footnote, the Appellate Division affirmed the trial court's order compelling arbitration and staying the proceedings. Given the favorable ruling, defendants had no reason to seek review of the Appellate Division's choice of law discussion, which itself was relegated to a footnote. 379 N.J.Super. at 234 n.3, 877 A.2d at 347 n.3. Indeed, since the Appellate Division's enforcement of the class action waiver suggested that there was no conflict between Delaware and New Jersey law, no conflict of laws analysis was warranted. *Fu v. Fu,* 160 N.J. 108, 733 A.2d 1133 (1999) (first prong of conflict analysis is whether there is an actual conflict).

On appeal to this Court, defendants once again devoted a section of their brief to the choice of law issue, offering this Court an alternate ground upon which to affirm the Appellate Division. (Db17-18) Nevertheless, in its August 9, 2006 opinion, this Court chose not to address the choice of

law issue, concluding in footnote 2 that defendants "did not seek review of the Appellate Division's determination of that issue," and thereby hinting that defendants should have filed a cross-appeal relating thereto and had waived the issue by not doing so. Respectfully, such a procedure was neither required nor appropriate under the circumstances, given defendants' unqualified victory below and the absence, until now, of a conflict between the law of New Jersey and Delaware on this issue.

Appeals are taken solely from orders or judgments, not judicial opinions. *Heffner v. Jacobson,* 100 N.J. 550, 553, 498 A.2d 766 (1985). *See Credit Bureau Collection Agency v. Lind,* 71 N.J. Super. 326, 328, 177 A.2d 36 (App. Div. 1961) ("An appeal lies not from a written or oral decision of the court, but only from a judgment or order.") A respondent is not required to file a cross-appeal in order to raise any argument supported by the record in defense of a judgment entered below. Only when the respondent seeks to obtain relief from any portion of the ***judgment*** entered below is a cross-appeal necessary. The respondent can argue any point on appeal to sustain the trial court's order. *New Jersey State Firemen's Mut. Benev. Ass'n. v. North Hudson Regional Fire & Rescue,* 340 N.J. Super. 577, 775 A.2d 43 (App. Div. 2001); *New Jersey Div. of Youth and Family Services v. B.G.S.,* 291 N.J. Super. 582, 677 A.2d 1170, 1172-1174 (App. Div. 1996).[3]

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[3] Moreover, an appellate court is capable of affirming the lower court's grant of relief to a respondent in the absence of a cross-appeal if that relief will sustain the trial court's judgment. *Chimes v. Oritani Motor Hotel, Inc.,* 195 N.J. Super. 435, 480 A.2d 218, 222 (App. Div. 1984). This allows the respondent to raise an alternate theory to sustain the trial court's judgment, without the necessity of filing a cross-appeal. Id. at 222 (holding that "a respondent can argue any point on the appeal to sustain the trial court's judgment," because "appeals are taken from judgments, not opinions.")

As a result of this Court's August 9 decision, there now exists a clear conflict between the law of New Jersey and Delaware on the enforceability of class arbitration waivers. Respectfully, the Court should direct the trial court to determine on remand whether Delaware law governs the unconscionability analysis of the arbitration agreement.

CONCLUSION

For all of the foregoing reasons, defendants-respondents respectfully request that this Court reconsider its ruling and affirm the decisions below. Should the Court decline reconsideration, defendants respectfully request that the case be remanded with additional instructions for the trial court to first determine whether the parties' choice of law provision should be enforced and second, for the trial court to make findings of fact to determine whether the assumptions underlying this Court's ruling are actually present in this case.

Respectfully submitted,

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